No. 29161—*Brian W. Rowe v. Sisters of the Pallottine Missionary Society, a non-profit corporation*

FILED
December 18, 2001
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OF WEST VIRGINIA

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
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McGraw, C.J., concurring:

I concur with the majority opinion's conclusion that the circuit court did not err in refusing to give a comparative negligence instruction to the jury. Also, having examined the record in its totality, I believe that appellant St. Mary's Hospital was not entitled to a new trial on the basis of a single comment by appellee's counsel during closing argument.

During appellee's initial closing argument, counsel indicated that "if Brian Rowe was a horse, I could come in here and say, Well, that horse's leg's worth—a Kentucky Derby winner, millions and millions of dollars. You wouldn't have any problem. This young man is certainly worth as much as a horse."

Appellant did not contemporaneously object to this statement. My dissenting colleagues suggest that the appellant's counsel did not need to contemporaneously object, concluding that of the West Virginia Trial Court Rule 23.04(b) "disfavors objections by counsel during closing arguments." *Lacy v. CSX Transp. Inc.*, 205 W. Va. 630, 639, 520 S.E.2d 418, 427 (1999). I must point out at the outset that in *Lacy* the challenging party had previously objected by way of a motion *in limine*, and the Court merely indicated that in such context a contemporaneous objection was unnecessary and, as a result,

disfavored under Rule 23.04(b). The Court in *Lacy* by no means suggested or implied that the longstanding requirement of a contemporaneous objection was abrogated by adoption of Rule 23.04(b).

Appellant argues that it could not fairly object to appellee's argument without drawing it undue attention. The problem with this position is that the record shows that appellant's counsel was ready, willing, and able to contemporaneously object to other comments made by appellee's counsel. The record reflects that, subsequent to appellee's racehorse analogy, the following occurred in front of the jury:

> Mr. Levine: Ladies and Gentlemen of the Jury, this case cries out for justice. It cries out for justice for two reasons. One, because he deserves it. And the other because we, as a society, need for you to tell hospitals you can't neglect us. You can't put commercials on TV and say "We are a healing place."
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> Mr. Farrell: Objection, your Honor.

In this instance, appellant's counsel properly interrupted "argument by opposing counsel . . . [as was] necessary to bring to the court's attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection." W. Va. Trial Ct. R. 23.04(b).

Furthermore, while the record suggests that appellant's counsel made some objection to the racehorse analogy to the circuit court before beginning his own closing argument, we do not know the substance of this argument. More importantly, *we do not know what relief—if any—that appellant sought.*

My dissenting colleagues suggest that "defense counsel approached the bench and motioned for a mistrial." I do not believe the record supports this interpretation of the record. Instead, I believe the record shows that appellant's counsel waited until after the jury was deliberating before seeking relief—and then, instead of attempting to cure the error, sought the ultimate sanction of a mistrial. The record, and the dissenting opinion, shows the following discussion occurred after the jury retired to begin its deliberations:

> The Court: . . . Mr. Farrell, you made an objection at the conclusion of the opening part of Mr. Levine's closing argument. Do you—I will state that that was done after the comment. Of course, the comments are always made before you can object, but it was made at the closing of his argument and not at the time of the comments.
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> Do you have any motions or things to say in that regard?
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> Mr. Farrell: Yes, your Honor. I would like to place on the record my objection that at the conclusion of the first half of Mr. Levine's closing argument, I approached the Court and informed the Court that I objected to Mr. Levine's argument concerning urging to jury to award damages based upon his comparison of what a Kentucky Derby winning horse and the horse's leg would be worth. . . .
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> Using the analogy of a Kentucky Derby winning horse, that if it had a damaged leg would be worth millions, and urging the jury to award to the plaintiff in this case likewise. We believe that is reversible error and I want to preserve my objection for it.

The record then shows the following discussion occurred:

> The Court: Mr. Levine, what do you have to say?
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> Mr. Levine: I don't think—if it came out that way, I didn't mean it to. But I think that the cure would have been to object at the time it was made and to have a curative instruction. I think Mr. Farrell—and he did object during part of the argument. I don't think I said it that way. . . .

> The Court: Well, because of prior case law in this state with a Kentucky Derby winner or horse race is used, it is the prime example they used for improper argument . . . by use of a formula. I noted it . . . I don't know that it approached an improper comparison, but at least enough to raise an eyebrow and take the motion. I don't know how to cure it except to say disregard it, which brings attention to it.

It appears that, at this point, counsel for appellant first made a motion for relief—and instead of asking for a curative instruction, asked for a mistrial:

> Mr. Farrell: Your Honor, at this time we would move for a mistrial based upon improper argument.
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> The Court: Do you want me to declare a mistrial?
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> Mr. Farrell: Yes, your Honor.
>
> The Court: Motion denied. May be renewed. But it's denied.

Our case law makes it clear that a party's failure to make a timely objection to improper closing argument, and to seek a curative instruction, waives the party's right to raise the question on appeal. We stated in syllabus point six of *Yuncke v. Welker*, 128 W. Va. 299, 36 S.E.2d 410 (1945), that:

> Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court.

Accord, syl. pt. 2, *State v. Adkins*, 209 W. Va. 212, 544 S.E.2d 914 (2001) (per curiam); syl. pt. 3, *Finley v. Norfolk & Western Ry. Co.*, 208 W. Va. 276, 540 S.E.2d 144 (1999) (per curiam); syl. pt. 1, *State v. Garrett*, 195 W. Va. 630, 466 S.E.2d 481 (1995); syl. pt. 5, *Tennant v. Marion*

Health Care Foundation, Inc., 194 W. Va. 97, 459 S.E.2d 374 (1995). Similarly, we stated in syllabus point six of *McCullough v. Clark*, 88 W. Va. 22, 106 S.E. 61 (1921):

> This court will not consider errors predicated upon the abuse of counsel of the privilege of argument, unless it appears that the complaining party asked for and was refused an instruction to the jury to disregard the improper remarks, and duly excepted to such refusal.

Accord, *Finley v. Norfolk & Western Ry. Co.*, 208 W. Va. 276, 282, 540 S.E.2d 144, 150 (1999) (per curiam); syl. pt. 4, *Skibo v. Shamrock Co., Ltd.*, 202 W. Va. 361, 504 S.E.2d 188 (1998) (per curiam); syl. pt. 10, *Pasquale v. Ohio Power Co.*, 187 W. Va. 292, 418 S.E.2d 738 (1992). Our statement in *Lacy v. CSX Transportation, Inc., supra*—that objections during closing arguments are "disfavored" where the challenging party has already sought and obtained a ruling *in limine* on an anticipated line of argument—did nothing to alter these requirements.

Appellant could have made a timely objection to appellee's closing argument, as was apparent by appellant's lone objection to another comment made at trial. Appellant chose to wait until after appellee completed his initial closing, and then appears to have only made an objection. Appellant did not seek an instruction to the jury to disregard the remark—instead, the record may be read to suggest that appellant waited until after the jury retired to deliberate to ask the circuit court for a mistrial.

On this record, the majority properly refused to examine the effect this remark by appellee's counsel may have had upon the jury's deliberations.

My dissenting colleagues state that appellee's racehorse analogy "without question, influenced the jury to return a verdict for the plaintiff in the amount of $880,186.00." I believe that, without an understanding of appellee's injuries, this statement unfairly ignores the evidence of appellee's injuries. The record firmly supports appellee's verdict. Appellee was admitted to the emergency room of appellant St. Mary's Hospital, and misdiagnosed with a sprain to his knee. For two and a half hours, nurses could not find a pulse in appellee's leg—yet he was released to go home. The next day, appellee was admitted to the emergency room of Cabell Huntington Hospital, and diagnosed as having a laceration to an artery in his knee. Within three hours, he was in surgery to repair the artery.

Appellee was hospitalized for 35 days, and left with massive scarring, nerve damage, a stiff ankle, a foot that he drags, a need for leg braces for the rest of his life. Because the leg braces force him to walk crooked, he is thrown off balance—and his back is now in constant pain. He can't walk properly, he can't sleep because of the pain and difficulty maintaining a comfortable posture, he can't run, he can't play sports. He can't even carry his young children up the stairs because he cannot maintain his balance.

I believe the jury in the instant case was properly entrusted to determine the value of appellee's leg. Even removing appellee's closing argument from the equation, the record amply supports the jury's verdict.

I therefore respectfully concur with the majority's opinion.